UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MAURO V. PEREZ, Petitioner, v. D.K. SISTO, Respondent.	CASE NO. 2:07-cv-00544-RSL-JLW REPORT AND RECOMMENDATION ON MERITS OF PETITION

I. SUMMARY

Petitioner Mauro Perez is currently incarcerated at the California State Prison, Solano in Vacaville, California. He was convicted by a jury of one count of second degree murder, with a two-year gun enhancement in Los Angeles County Superior Court on July 28, 1989. He is currently serving a sentence of seventeen-years-to-life with the possibility of parole and has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 challenging his 2005 parole denial by the Board of Parole Hearings of the State of California (the "Board").[1] (*See* Docket 1.)

[1] The Board of Parole Hearings replaced the Board of Prison Terms, which was abolished on July 1, 2005. *See* California Penal Code § 5075(a).

Respondent initially moved to dismiss the petition on the basis that it was untimely under the one-year statute of limitation set forth in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). (*See* Dkt. 10.) This Court denied respondent's motion and directed respondent to file an answer to the petition. (*See* Dkts. 12 & 13.) Respondent has now filed an answer together with relevant portions of the state court record. (*See* Dkt. 15.) Petitioner filed a traverse in reply. (*See* Dkt. 16.)

Petitioner contends the Board's decision to deny him parole violated his Fifth and Fourteenth Amendment due process rights on the ground that there is no evidence to support its decision. In addition, he challenges the applicability of the so-called "some evidence" standard of review and contends the Board should have engaged in a proportionality or comparative review process in evaluating his suitability for parole. Finally, he claims the Board "seeks to impose upon him, ex post facto, the greater penalty of life without the possibility of parole under special circumstances in violation of the Fifth, Sixth and Fourteenth Amendments." (Dkt. 1 at 20-21.)

This Court also directed respondent to provide copies of petitioner's three prior parole consideration hearing transcripts in the event that the information contained therein would assist this Court in evaluating petitioner's due process claim. (*See* Dkt. 19.) Respondent produced the transcripts as requested, however, he contends this Court is barred from considering these documents because petitioner failed to attach them to his state habeas petition and, thus, they were not part of the state court record. (S*ee* Dkt. 21.) Pursuant to Rule 5(c) and Rule 7(a), a federal habeas court may consider transcripts of prior proceedings as well as expand the record to include additional materials relating to the petition.

Accordingly, I recommend the Court reject respondent's contention and review the hearing transcripts.

Briefing is now complete and this matter is ripe for review. The Court, having thoroughly reviewed the record and briefing of the parties, recommends the Court deny the petition and dismiss this action with prejudice.

II. STANDARD OF REVIEW

The Anti-Terrorism and Effective Death Penalty Act of 1996 governs this petition as it was filed after the enactment of AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997). Because petitioner is in custody of the California Department of Corrections pursuant to a state court judgment, 28 U.S.C. § 2254 provides the exclusive vehicle for his habeas petition. *See White v. Lambert*, 370 F.3d 1002, 1009-10 (9th Cir.), *cert. denied*, 543 U.S. 991 (2004) (providing that § 2254 is "the exclusive vehicle for a habeas petition by a state prisoner in custody pursuant to a state court judgment, even when the petitioner is not challenging his underlying state court conviction."). Under AEDPA, a habeas petition may not be granted with respect to any claim adjudicated on the merits in state court unless petitioner demonstrates that the highest state court decision rejecting his petition was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) and (2).

As a threshold matter, this Court must ascertain whether relevant federal law was "clearly established" at the time of the state court's decision. To make this determination, the

Court may only consider the holdings, as opposed to dicta, of the United States Supreme Court. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000). In this context, Ninth Circuit precedent remains persuasive but not binding authority. *See Williams*, 529 U.S. at 412-13; *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

The Court must then determine whether the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law." *See Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-13. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. At all times, a federal habeas court must keep in mind that it "may not issue the writ simply because [it] concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be [objectively] unreasonable." *Id.* at 411.

In each case, the petitioner has the burden of establishing that the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254; *Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996). To determine whether the petitioner has met this burden, a federal habeas court normally looks to the last reasoned state court decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Medley*

v. Runnels, 506 F.3d 857, 862 (9th Cir. 2007). Where, as in this case, the state courts issue summary denials without explaining their reasons, *see infra*, this Court must conduct an independent review of the record to determine whether the state courts' decisions were contrary or involved an unreasonable application of Supreme Court holdings. *See Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000).

Finally, AEDPA requires federal courts to give considerable deference to state court decisions, and state courts' factual findings are presumed correct. *See* 28 U.S.C. § 2254(e)(1). Federal courts are also bound by a state's interpretation of its own laws. *See Murtishaw v. Woodford*, 255 F.3d 926, 964 (9th Cir. 2001) (citing *Powell v. Ducharme*, 998 F.2d 710, 713 (9th Cir. 1993)).

III. PRIOR STATE COURT PROCEEDINGS

Respondent now states that petitioner has properly exhausted his state court remedies, and timely filed the instant petition with regard to what he claims "amounts to one" ground for relief – that there is no evidence to support the Board's 2005 decision to deny parole. (*See* Dkt. 15 at 9.) As discussed *infra*, the petition clearly challenges the Board's decision on both due process and ex post facto grounds. (*See* Dkt. 1.) Petitioner also challenges the applicability of the so-called "some evidence" standard of review, and contends the Board should have engaged in a proportionality or comparative review process in evaluating his suitability for parole. Except for petitioner's due process claim, respondent fails to address any of the aforementioned, despite the requirement of Rule 5(b) of the Rules Governing Section 2254 Cases in the United States District Courts. (*See* Dkt. 15 at 9.) Because this appears to be an oversight and both parties have already experienced substantial delays in this

case, this Court believes it is in the interest of justice to proceed without additional briefing. Accordingly, the Court has independently reviewed the record and determined that petitioner has properly presented all of his issues and contentions to the state's highest court. (*See id.*, Exhibit F.) *See* 28 U.S.C. § 2254(b)(3); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) ("[s]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process"); *see also Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999) (holding that California law requires presentation of claims to the California Supreme Court through petition for discretionary review in order to exhaust state court remedies). Accordingly, I recommend the Court find that petitioner has properly exhausted all claims raised in his federal habeas corpus petition.

Once it has been determined that a petitioner's claims have been exhausted, this Court typically looks to the state court's orders upholding the Board's decision to determine whether they meet the deferential AEDPA standard. *See Ylst*, 501 U.S. at 803-04. In this case, the only state court presented with the habeas corpus petition and, thus, the only state court to review it was the California State Supreme Court. (*See* Dkt. 1 at 7 & Dkt. 15 at 8 and 10.) The California Supreme Court denied the petition without comment. (*See* Dkt. 15, Exh. F.) As discussed *supra*, when a state court issues a decision on the merits but does not provide a reasoned decision, we review the record independently to determine whether that decision was objectively reasonable. *See Delgado*, 223 F.3d at 982. Accordingly, this Court must conduct an independent review of all of petitioner's claims. Although our review of the

record is conducted independently, we continue to show deference to the state court's ultimate decision. *See Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002).

IV. BACKGROUND

The Board's 2005 report relied entirely upon the 1989 Probation Officer's Report in summarizing the facts of the crime as follows:

> On June 30, 1988, at about 9:20 p.m., in front of a bar, Victor's Club . . . at 3231 North Main Street, the defendant walked up to the victim whom he had had a losing fist fight with about three weeks prior and shot him [once] in the chest with a nine millimeter handgun after engaging in a brief conversation with the victim, who was standing at a traffic sign. One of the four eyewitnesses to the incident temporarily detained the victim – [sic] the defendant, but released him when the victim fell to the ground. The defendant left hurriedly in his car and fired additional shots into the air. A witness jotted down his car's license plate number and the police were called. The defendant was arrested the next day, but denied shooting the victim although he admitted being beaten up by the victim. Witnesses later positively identified the defendant as the person who shot the victim.

(Dkt. 15, Exh. C at 10.) During the 2005 parole hearing, petitioner agreed with the above facts, with one exception -- he maintains that the victim was standing outside of the bar, not at a traffic signal. (*See id*. at 10-11.)

Petitioner was tried by a jury and convicted of second degree murder with a firearm enhancement on July 28, 1989, in Los Angeles County Superior Court. (*See id*, Exh. A.) He began serving his sentence of seventeen-years-to-life with the possibility of parole on August 10, 1989. (*See id.*, Exh. C at 1.) His minimum eligible parole date was set for November 2, 1999. (*See id*.) Petitioner has now been incarcerated for approximately twenty years for this offense.

The parole denial which is the subject of this petition followed a parole hearing held on May 11, 2005. This was petitioner's fourth application, including his initial parole consideration hearing. (*See* Dkt. 1 at 5.) His previous applications were also denied. After denial of his 2005 application, petitioner filed a habeas corpus petition in the California Supreme Court. As discussed, *supra*, that petition was unsuccessful. This federal habeas petition followed. Petitioner contends the 2005 denial by the Board violated his federal constitutional rights. Thus, the habeas petition before this Court does not attack the propriety of his conviction or sentence.

V. FEDERAL HABEAS CHALLENGES TO STATE PAROLE DENIALS

A. *Due Process Right to be Released on Parole*

Under the Fifth and Fourteenth Amendments to the United States Constitution, the government is prohibited from depriving an inmate of life, liberty or property without the due process of law. U.S. Const. amends. V, XIV. A prisoner's due process claim must be analyzed in two steps: the first asks whether the state has interfered with a constitutionally protected liberty or property interest of the prisoner, and the second asks whether the procedures accompanying that interference were constitutionally sufficient. *Ky. Dep't of Corrs. v. Thompson*, 490 U.S. 454, 460 (1989); *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1127 (9th Cir. 2006).

Accordingly, our first inquiry is whether petitioner has a constitutionally protected liberty interest in parole. The Supreme Court articulated the governing rule in this area in *Greenholtz v. Inmates of Neb. Penal*, 442 U.S. 1 (1979), and *Board of Pardons v. Allen*, 482 U.S. 369 (1987). *See McQuillion v. Duncan*, 306 F.3d 895, 902 (9th Cir. 2002) (applying

"the 'clearly established' framework of *Greenholtz* and *Allen"* to California's parole scheme). The Court in *Greenholtz* determined that although there is no constitutional right to be conditionally released on parole, if a state's statutory scheme employs mandatory language that creates a presumption that parole release will be granted if certain designated findings are made, the statute gives rise to a constitutional liberty interest. *See Greenholtz*, 442 U.S. at 7, 12; *Allen*, 482 U.S. at 377-78.

As discussed *infra*, California statutes and regulations afford a prisoner serving an indeterminate life sentence an expectation of parole unless, in the judgment of the parole authority, he "will pose an unreasonable risk of danger to society if released from prison." Title 15 Cal. Code Regs., § 2402(a). The Ninth Circuit has therefore held that "California's parole scheme gives rise to a cognizable liberty interest in release on parole." *McQuillion*, 306 F.3d at 902. To similar effect, *Irons v. Carey*, 505 F.3d 846, 850 (9th Cir. 2007) held that California Penal Code § 3041 vests all "prisoners whose sentences provide for the possibility of parole with a constitutionally protected liberty interest in the receipt of a parole release date, a liberty interest that is protected by the procedural safeguards of the Due Process Clause." This "liberty interest is created, not upon the grant of a parole date, but upon the incarceration of the inmate." *Biggs v. Terhune*, 334 F.3d 910, 915 (2003). *See also Sass*, 461 F.3d at 1127.

Because the Board's denial of parole interfered with petitioner's constitutionally-protected liberty interest, this Court must proceed to the second step in the procedural due process analysis and determine whether the procedures accompanying that interference were constitutionally sufficient. "[T]he Supreme Court [has] clearly established that a parole

board's decision deprives a prisoner of due process with respect to this interest if the board's decision is not supported by 'some evidence in the record.'" *Irons*, 505 F.3d at 851 (citing *Superintendent v. Hill*, 472 U.S. 445, 457 (1985) (holding the "some evidence" standard applies in prison disciplinary proceedings)). The "some evidence" standard requires this Court to determine "whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." *Hill*, 472 U.S. at 455-56. Although *Hill* involved the accumulation of good time credits rather than release on parole, later cases have held that the same constitutional principles apply in the parole context because both situations directly affect the duration of the prison term. *See e.g., Jancsek v. Or. Bd. of Parole*, 833 F.2d 1389, 1390 (9th Cir. 1987) (adopting the "some evidence" standard set forth by the Supreme Court in *Hill* in the parole context); *accord, Sass*, 461 F.3d at 1128-29); *Biggs*, 334 F.3d at 915; *McQuillion*, 306 F.3d at 904.

"The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact," however. *Hill*, 472 U.S. at 456. Similarly, the "some evidence" standard is not an invitation to examine the entire record, independently assess witnesses' credibility, or re-weigh the evidence. *Id.* at 455. Instead, it is there to ensure that an inmate's loss of parole was not arbitrarily imposed. *See id.* at 454. The Court in *Hill* added an exclamation point to the limited scope of federal habeas review when it upheld the finding of the prison administrators despite the Court's characterization of the supporting evidence as "meager." *See id.* at 457.

//

//

B. *California's Statutory and Regulatory Scheme*

In order to determine whether "some evidence" supported the Board's decision with respect to petitioner, this Court must consider the California statutes and regulations that govern the Board's decision-making. *See Biggs*, 334 F.3d at 915. Under California law, the Board is authorized to set release dates and grant parole for inmates with indeterminate sentences. *See* Cal. Penal Code § 3040 and 5075, *et seq*. Section 3041(a) requires the Board to meet with each inmate one year before the expiration of his minimum sentence and normally set a release date in a manner that will provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public, as well as comply with applicable sentencing rules. Subsection (b) of this section requires that the Board set a release date "unless it determines that the gravity of current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration." *Id.*, § 3041(b). Pursuant to the mandate of § 3041(a), the Board must "establish criteria for the setting of parole release dates" which take into account the number of victims of the offense as well as other factors in mitigation or aggravation of the crime. The Board has therefore promulgated regulations setting forth the guidelines it must follow when determining parole suitability. *See* 15 CCR § 2402, *et seq*.

Accordingly, the Board is guided by the following regulations in making a determination whether a prisoner is suitable for parole:

> (a) General. The panel shall first determine whether the life prisoner is suitable for release on parole. Regardless of the length of time served, a life prisoner shall be found unsuitable

> for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.
>
> (b) Information Considered. All relevant, reliable information available to the panel shall be considered in determining suitability for parole. Such information shall include the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability.

15 CCR § 2402(a) and (b). Subsections (c) and (d) also set forth suitability and unsuitability factors to further assist the Board in analyzing whether an inmate should be granted parole, although "the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel." 15 CCR § 2402(c).

In examining its own statutory and regulatory framework, the California Supreme Court in *In re Lawrence* recently held that the proper inquiry for a reviewing court is "whether some evidence supports the *decision* of the Board … that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." *In re Lawrence*, 44 Cal.4th 1181, 1212 (2008). The court also asserted that the Board's decision must demonstrate "an individualized consideration of the specified criteria, but "[i]t is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those

factors interrelate to support a conclusion of current dangerousness to the public." *Id*. at 1204-05, 1212. As long as the evidence underlying the Board's decision has "some indicia of reliability," parole has not been arbitrarily denied. *See Jancsek*, 833 F.2d at 1390. As the California courts have continually noted, the Board's discretion in parole release matters is very broad. *See Lawrence*, 44 Cal.4th at 1204. Thus, the penal code, corresponding regulations, and California law clearly establish that the fundamental consideration in parole decisions is public safety and an assessment of a prisoner's current dangerousness. *See id.*, at 1205-06.

C. *Summary of Governing Principles*

By virtue of California law, petitioner has a constitutional liberty interest in release on parole. The parole authorities may decline to set a parole date only upon a finding that petitioner's release would present an unreasonable present risk of danger to society if he is released from prison. Where the parole authorities deny release, based upon an adverse finding on that issue, the role of a federal habeas court is narrowly limited. It must deny relief if there is "some evidence" in the record to support the parole authority's finding of present dangerousness. The penal code, corresponding regulations, and California law clearly support the foregoing interpretation.

VI. PARTIES' CONTENTIONS

As discussed in Section III, *supra*, petitioner challenges the Board's 2005 decision to deny parole on both due process and ex post facto grounds. (*See* Dkt. 1.) Petitioner's first contention alleges that the Board's decision violated his state and federal constitutional due

process rights because there is no evidence to support its decision.[2] Specifically, he contends the Board improperly relied upon immutable factors, failed to support its finding regarding his lack of self-help programming, and did not engage in a proportionality or comparative review process in evaluating his suitability for parole. (*See id.* 1 at 6-8.) Petitioner also claims the Board "seeks to impose upon him, ex post facto, the greater penalty of life without the possibility of parole under special circumstances in violation of the Fifth, Sixth and Fourteenth Amendments." (*Id.* at 20-21.) Finally, petitioner challenges the applicability of the so-called "some evidence" standard of review. Because this Court has determined that the "some evidence" standard of review is the appropriate standard in the parole context (Section V, *supra*), I recommend the Court reject petitioner's contention that the preponderance of the evidence standard is applicable in this case. (*See id.* 1 at 9-11.)

Respondent claims petitioner does not have a constitutionally protected liberty interest in being released on parole, that the "some evidence" standard is inapplicable in this context, and that even if he does have a protected liberty interest, the Board adequately predicated its denial of parole on "some evidence." (*See* Dkt. 15 at 4-11.) Accordingly, respondent argues that petitioner's constitutional rights were not violated by the Board's 2005 decision and that the state court's decision was not contrary to or an unreasonable application of United States Supreme Court law, nor was it an unreasonable determination of the facts. (*See id.* at 10.)

[2] We do not reach petitioner's claims that his state due process rights under the California Constitution were violated, as state claims are not cognizable in a federal habeas petition. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (asserting that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions").

VIII. ANALYSIS OF RECORD IN THIS CASE

A. *Due Process Violation*

The Board based its decision that petitioner was unsuitable for parole primarily upon his commitment offense, as well as upon his escalating pattern of criminal activity, unstable social history, failure to profit from society's previous attempts to correct his criminality, insufficient participation in self-help programming, and only recent gains with regard to acceptance of responsibility for the crime. (*See id.*, Exh. C at 63-67.) The Board's findings track the applicable unsuitability and suitability factors listed in Section 2402(b), (c) and (d) of Chapter 15 of the California Code of Regulations. After considering all reliable evidence in the record, the Board denied petitioner a parole release date and reset his parole suitability hearing for the following year. (*See id.* at 66-68.)

In considering unsuitability factors, the Board typically relies heavily on the circumstances of the commitment offense to support the finding that that the crime was carried out in "an especially heinous, atrocious or cruel manner." *See* 15 CCR § 2402 (c)(1). In this case, the only factor cited by the Board in support of the commitment offense was that the motive was trivial. (*See id*. at 64.) *See* 15 CCR § 2402(c)(1)(E). As discussed *supra*, the commitment offense involved petitioner, in a drug-and-alcohol-induced state, seeing the victim in front of a bar and shooting him once in the chest. Petitioner claims he was beaten up by the victim and the victim's friends several weeks earlier after receiving a taste of cocaine from the victim and failing to pay him for the sample. He feared the victim, who petitioner thought was carrying some type of weapon that night. After being briefly detained by several eye-witnesses, petitioner fled the scene. While it is debatable whether the motive

for the crime in this case was "inexplicable," there is "some evidence" to support the Board's finding that it was "very trivial in relation to the offense."

The second unsuitability factor relied upon was petitioner's escalating pattern of criminal misconduct. (*See* Dkt. 15, Exh. C at 64-65.) Petitioner's criminal history shows an increasing pattern of criminal conduct, culminating in the second degree murder offense. His other crimes, while often related to his alcoholism, include possession of a firearm, burglary (multiple offenses), driving under the influence (multiple offenses), trespassing, disturbing the peace, and an immigration violation. (*See* Dkt. 1, Exh. B at 1 & Exh. C at 2-3.) The applicable guidelines direct the Board to consider all relevant and reliable information, which includes a prisoner's involvement in any criminal conduct which is reliably documented. *See* 15 CCR § 2402(b). Thus, the Board properly considered petitioner's criminal history in support of its decision and correctly found an escalating pattern of criminal activity.

The third unsuitability factor relied upon by the Board was petitioner's unstable social history. (*See* Dkt. 15, Exh. C at 65.) An "unstable social history" is defined as a "history of unstable or tumultuous relationships with others." *See* 15 CCR § 2402(c)(3). The Board cited petitioner's "alcohol and cocaine abuse and his criminal behavior" to support this factor. (Dkt. 15, Exh. C at 65.) Petitioner's prior criminal behavior was the basis of the Board's finding of "escalating criminal activity," and provides nothing additional to support a finding of "unstable social history." Thus, petitioner's alcohol and cocaine abuse, without more, do not support the Board's finding that petitioner had a history of unstable or tumultuous relationships. In fact, prior to and during his incarceration, petitioner appears to have

maintained exceptionally close familial relations. Accordingly, there is no evidence to support the Board's finding with regard to this factor.

The fourth factor cited by the Board was petitioner's failure to profit from society's previous attempts to correct his criminality, such as time spent in county jail and prior grants of probation. (*See id.*, Exh. C at 65.) Petitioner's criminal record supports this finding.

The fifth and sixth factors cited by the Board were petitioner's insufficient participation in self-help programming and institutional behavior. (*See id.*) Specifically, the Board stated that petitioner "programmed well while he's been in the institution, but has not yet sufficiently participated in beneficial self-help programming. He's only had one serious 115 disciplinary, and that was back in 1991, and that was for fighting." (*Id.*) In explaining its finding, the Board praised petitioner, stating:

> We want to commend you, though. You've been doing a good job in programming. You've been disciplinary free since 1991. You've been participating in AA and NA and I want to note again for the record that Mr. Perez got his GED back in 1995. However, currently, the positive aspects of his behavior do not outweigh the factors of unsuitability. What we recommend to you, Mr. Perez, is that you continue your good programming, add self-help wherever you can. If you can't get into programs in the institution, you can certainly do work on your own and in your cell. And continue to remain disciplinary free.

(Dkt. 15, Exh. C at 66.) As is evident from the above excerpts, the Board simultaneously compliments petitioner's self-help programming while stating that he needs to continue to do more. It is clear from the record that petitioner has had only one disciplinary infraction, which occurred eighteen years ago, and that his institutional behavior is not at issue. What is unclear, however, is what type of additional programming is necessary. In reviewing

petitioner's 2005 psychosocial evaluation, Dr. Taylor states that petitioner completed the following self-help courses:

> a Discipleship Seminar (1991), a Stress Management Class (2004), Anger Management, Crime Prevention, is a Men's Violence Prevention Program sponsor, and completed Men's Violence Prevention Program a second time as of 6-04. He attends the Discipleship class every Wednesday and attends church every Sunday. On the weekends, he is involved in counseling at the church.

(Dkt. 1, Exh. B at 1-2.) In addition, the same report notes that petitioner has regularly attended Alcoholics Anonymous for years, and continues to do so, and that he "has upgraded himself educationally, vocationally, and personally and seems to make good use of self-help groups." (*Id.* at 2-3). Accordingly, the evidence in the record does not support the Board's finding that petitioner's additional self-help programming or that his institutional behavior prior to the 2005 hearing provided an independent basis for a finding of unsuitability. It was appropriate for the Board, however, to encourage petitioner to continue and expand his positive institutional record for the duration of his incarceration.

The final factor cited by the Board is that petitioner has changed his description of the facts surrounding the criminal offense over the years and, thus, has only recently accepted responsibility for the crime. Concluding that petitioner's progress was recent, the Board explained:

> In the 1998 transcript of your hearing, you made some statements about what happened during the commitment offense. You said that the ---You added a guy to the scenario. You said that there was a guy that you owed money to for about three months who had a tire iron and that the victim, quote, "came at you with a knife." You also said that people had reported hearing you fire shots as you drove away, but that

> those were actually shots being fired at you. And then in your 2001 and your 2004 hearing, you said that someone grabbed your arm and somehow the gun went off. Now today you said pretty much the same thing that you said in the probation officer's report, which was that you saw him coming towards you, you thought he might have something in his hand and that you shot the gun. So I just wanted you to be aware of that, because I think probably at your original Initial Hearing, the Commissioner probably told you that it was important to be honest because when you make misstatements, they can come back and be a problem for you. So I just want you to know that those are there so that you can be prepared to answer that again, because I know that those will probably be raised again.

(*Id.* at 67.) Although petitioner did not claim self-defense during the 2005 hearing and his recent psychosocial report indicates he accepts responsibility for his actions and is remorseful (dkt. 1, exh. C at 3), the three prior parole consideration hearing transcripts support the Board's finding that his story has varied over the years. (See Dkt. 21.) Petitioner's claim that his age (69) and consequent memory loss might be at fault is not convincing, after reviewing the three prior parole consideration hearing transcripts. Because petitioner's description of the facts surrounding the offense have varied, there is "some evidence" to support the Board's conclusion that petitioner's progress is recent and that he needs additional time to accept responsibility for the crime.

In summary, therefore, the record contains "some evidence" to support four of the six reasons the Board gave for finding him unsuitable for parole. As stated above, it is beyond the authority of a federal habeas court to determine whether evidence of suitability outweighs the circumstances of the commitment offense, together with any other reliable evidence of unsuitability for parole. The Board has broad discretion to determine how suitability and unsuitability factors interrelate to support its conclusion of current dangerousness to the

public. *See Lawrence*, 44 Cal.4th at 1212. In this case, the Board acknowledged petitioner's progress, but concluded that he needed additional time to demonstrate his suitability for parole. The Board's findings are therefore supported by "some evidence" in the record.

Petitioner's contention that the Board should have engaged in a proportionality or comparative review process in evaluating his suitability for parole also lacks merit. There is no such federal constitutional requirement and, in interpreting the statutory requirements at issue in this case, the California State Supreme Court has held that the Board must conduct an individualized inquiry. *See Lawrence*, 44 Cal.4th at 1221 (citing *In re Dannenberg*, 34 Cal.4th 1061, 1083-1084 (2005)). Thus, whether his "commitment offense is more or less egregious than other, similar crimes" is inapposite under the relevant statutory framework. *Id.*

B. *Ex Post Facto Violation*

Petitioner claims the Board "seeks to impose upon him, *ex post facto*, the greater penalty of life without the possibility of parole under special circumstances in violation of the Fifth, Sixth and Fourteenth Amendments." (Dkt. 1 at 20-21.) Petitioner's claim fails for several reasons. First, Article I of the United States Constitution provides that neither Congress nor any state shall pass an ex post facto law. U.S. Const. Art. I, § 9, cl. 3, Art. I, §10, cl. 1. Hence, the Ex Post Facto Clause, by definition, applies to the Legislative Branch, not to the courts or an administrative body, such as the Board. *See Rogers v. Tennessee*, 532 U.S. 451, 460 (2001) (holding "[t]he Ex Post Facto Clause, by its own terms, does not apply to courts"); *Marks v. United States*, 430 U.S. 188, 191 (1977) (holding "t]he Ex Post Facto Clause is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government") (citations omitted)); *Lagrand v. Stewart*, 133 F.3d

1253, 1260 (9th Cir. 1998) (holding "[t]he Ex Post Facto Clause does not apply to court decisions construing statutes.")

Moreover, the Board has not increased petitioner's punishment. The Ex Post Facto Clause prohibits the retrospective application of criminal statutes that change the definition of a crime or enhance the punishment for a criminal offense. *See Collins v. Youngblood*, 497 U.S. 37, 41 (1990) ("Although the Latin phrase 'ex post facto' literally encompasses any law passed 'after the fact,' it has long been recognized . . . that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them.") Petitioner was sentenced to a term of seventeen-years-to-life. While petitioner might have hoped or expected to be released sooner, the Board's decision to deny him a parole release date has not enhanced his punishment or sentence.

Petitioner cites the United States Supreme Court's decision in *Cunningham v. California*, 549 U.S. 270 (2007), in support of his contention that the Board has enhanced his sentence in violation of his Sixth and Fourteenth Amendment rights. The Court in *Cunningham* held that because California's determinate sentencing law allows a judge, not a jury, to find facts permitting a higher level sentence than that found by the jury, it violates the defendant's right to trial by jury, as guaranteed by the Sixth and Fourteenth Amendments. *See id.* at 279-294. As discussed above, the Board's decision denying petitioner a parole release date does not alter his fifteen-years-to-life sentence and, therefore, does not implicate *Cunningham*.

Accordingly, the Board's decision denying petitioner a parole release date did not violate the Ex Post Facto Clause and petitioner's claim should be denied.

IX. CONCLUSION

Given the totality of the Board's findings, there is "some evidence" in the record that petitioner's release date as of the Board's 2005 decision would have posed an unreasonable risk to public safety. The California Supreme Court's Order upholding the Board's decision was therefore not contrary to, or an unreasonable application of, clearly established federal law, or based on an unreasonable determination of facts. Because the Board and the state courts' ultimate decisions were supported by "some evidence," there is no need to reach respondent's argument that another standard applies. Accordingly, I recommend the Court find the petitioner's constitutional rights were not violated, that the petition be denied and that this action be dismissed with prejudice.

This Report and Recommendation on Merits of Petition is submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with this Report and Recommendation on Merits of Petition, any party may file written objections with this Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Report and Recommendation on Merits of Petition." Failure to file objections within the specified time may waive the right to appeal the District Court's Order. *See Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). A proposed order accompanies this Report and Recommendation on Merits of Petition.

DATED this 9th day of September, 2009.

JOHN L. WEINBERG
United States Magistrate Judge